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Comptroller General
of the United States

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Decision

Matter of: Dynacs Engineering Company, Inc.

File: B-284234; B-284234.2; B-284234.3

Date: March 17, 2000

James S. Ganther, Esq., Ganther & Fee, for the protester.

Michael A. Hordell, Esq., Gadsby & Hannah, for Federal Data Corporation, an intervenor.

Bernard J. Roan, Esq., National Aeronautics & Space Administration, for the agency.
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In evaluating awardee's past performance, procuring agency reasonably decided not to consider information that awardee had experienced transition problems in performing an ongoing contract, where awardee explained that performance problems in fact were not the result of its actions, and cognizant contracting officials had not actually assigned awardee a negative performance rating at the time of past performance evaluation.
2. There is no prohibition against an agency's raising items during second round of discussions that it discussed with the offeror during the first round.

DECISION

Dynacs Engineering Company, Inc. protests the award of a contract to Federal Data Corporation (FDC) under request for proposals (RFP) No. 3-094978, issued by the National Aeronautics and Space Administration (NASA) for the development and operation of international space station facilities, and the development and performance of microgravity experiments. Dynacs protests that NASA misevaluated its and the awardee's proposals, held improper discussions with the awardee and conducted an inadequate cost/price/technical tradeoff.¹

¹ In its initial protest, Dynacs also asserted that the agency improperly penalized Dynacs twice for cost realism, failed to hold meaningful discussions with Dynacs, applied unstated evaluation criteria, and gave cost/price undue weight in the

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We deny the protest.

The solicitation provided for proposals to be evaluated under three equal factors--mission suitability, cost/price and past performance. RFP § M.3 (a). Mission suitability was comprised of four subfactors--understanding the requirement, management plan, key personnel, and corporate resources. RFP § M.4. Proposals were to be assigned a point score and an adjectival rating for each subfactor, as well as the overall mission suitability factor. Id. Past performance also was evaluated with an adjectival rating. RFP § M.8. With respect to cost, the solicitation was comprised of both fixed-price and cost-reimbursement items, and accordingly provided for both a price analysis (of the fixed-price items) and a cost realism analysis (of the cost-reimbursement items). RFP § M.5. In addition, the mission suitability score was to be adjusted based on the cost realism analysis. RFP § M.6. Award was to be made to the offeror that submitted the proposal offering the best value to the government. RFP § M.3.

Four offers were received and, following an initial evaluation by the source evaluation board (SEB), two--Dynacs's and FDC's--were included in the competitive range. NASA held discussions with both offerors and requested that each submit a final proposal revision (FPR-1). After FPR-1 was received, the agency held a second round of discussions and asked offerors to submit a second final proposal revision (FPR-2). Following the evaluation of FPR-2, both Dynacs, with a score of 881, and FDC, with a score of 740, were rated very good under the mission suitability factor. Contracting Officer's Statement (COS), Jan. 7, 2000, at 10, and both were also rated superior for past performance. Source Selection Statement (SSS) at 8, 9. With respect to cost/price, FDC's proposal was evaluated at [DELETED] lower than Dynacs's, and FDC also was found to have offered a very favorable share ratio (the percentage of costs FDC would absorb in the event of cost overruns on the cost-reimbursement items). SSS Addendum (SSSA) at 4. The source selection authority (SSA) reviewed the evaluation results, and determined that FDC's proposal offered the best value to the government. SSS at 10. Award thus was made to FDC, and this protest followed.

PAST PERFORMANCE

The solicitation provided that the past performance of the offerors and any subcontractors and teaming partners would be assigned an adjectival rating of superior, satisfactory or unsatisfactory, based on their demonstrated

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cost/price/technical tradeoff. The agency addressed each of these issues in its report, and Dynacs did not rebut the agency's arguments in its report comments. Accordingly, we consider these issues abandoned. See RGII Techs., Inc.--Recon. and Protest, B-278352.2, B-278352.3, Apr. 14, 1998, 98-1 CPD ¶ 130 at 5 n.4.

accomplishment of work of similar magnitude, scope and complexity to the work required by the RFP. RFP § M.8. Dynacs argues that the agency, in assigning FDC a superior rating, unreasonably failed to consider negative past performance information regarding FDC's performance of an ongoing NASA contract at the Glenn Research Center (GRC). In this regard, during the first round of discussions, before offerors submitted FPR-1, the SEB learned that the contracting officer's representative (COR) administering that contract intended to give FDC a negative performance rating for its transition effort. COS, Jan. 7, 2000, at 7.

We review an agency's evaluation of an offerors' past performance only to ensure that it was reasonable and consistent with the stated evaluation criteria and applicable statutes and regulations, since assessing the relative merits of competing offerors' past performance (and of their proposals overall) is primarily a matter of administrative discretion. A protester's mere disagreement with the agency's judgment does not establish that the evaluation was unreasonable. The Communities Group, B-283147, Oct. 12, 1999, 99-2 CPD ¶ 101, at 5, 6.

The evaluation in this area was reasonable. After learning of the COR's potential negative rating, NASA asked FDC to respond to this information. FDC did so, both explaining its position, and sending the SEB a copy of the response it had sent to the COR. According to FDC's response, the transition effort did not go well for reasons other than FDC's actions; FDC maintained that the follow-on contractor caused many of the problems. Letters from FDC to NASA (Sept. 10 and 13, 1999). Since the COR had not actually assigned FDC a negative final rating, the SEB considered the issue unresolved and did not use it to downgrade FDC in the past performance evaluation. COS, Jan. 7, 2000, at 8. We see nothing improper in the SEB's actions. Since the COR had not provided a final rating by the time the SEB was completing its past performance evaluation, and FDC provided a response in which it denied that it was responsible for the difficult transition, it was reasonable not to automatically attribute the problems to FDC. We think the SEB therefore reasonably could conclude that the information available did not support a finding of deficient past performance, and thus did not warrant downgrading FDC. See The Communities Group, supra.

DISCUSSIONS

Dynacs asserts that, during the second round of discussions, NASA improperly raised issues with FDC relating to its proposed staffing that NASA already had raised during the first round of discussions. Dynacs maintains that it was improper to afford FDC a second opportunity to respond to its concerns and that, if FDC had not been given a second opportunity to correct the deficiencies, the deficiencies would have remained and Dynacs would have been entitled to the award.

Even if the protester is correct that NASA raised the same concerns in both rounds of discussions (NASA disputes this), doing so was not improper. Solicitations issued

after January 1, 1998, such as the one here, are governed by the Federal Acquisition Regulation (FAR), as amended by Federal Acquisition Circular (FAC) No. 97-02. The FAR part 15 rewrite included in this version of the regulation revised the provisions that apply when an agency is contracting using negotiated procedures, including those provisions governing exchanges with offerors after the receipt of proposals, as set forth in FAR § 15.306. The prior version of the FAR contained provisions that could be read to limit the extent to which agencies conducted ongoing discussions with an offeror. For example, agencies were prohibited from engaging in technical leveling (helping an offeror to bring its proposal up to the level of other proposals through successive rounds of discussions, such as by pointing out weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal). See FAR § 15.610(d) (June 1997); Professional Servs. Group, Inc., B-274289.2, Dec. 19, 1996, 97-1 CPD ¶ 54 at 5. Agencies were also cautioned against reopening discussions after receipt of best and final offers unless it was clear that the information already available was inadequate to reasonably justify contractor selection and award. FAR § 15.611(c) (June 1997). These restrictions were eliminated by the part 15 rewrite. The current FAR does not discourage agencies from resolving a given proposal weakness or deficiency by means of multiple rounds of discussions with the offeror. See FAR § 15.306; Spectrum Science & Software, Inc., B-282373, June 22, 1999, 99-1 CPD ¶ 114 at 4. Indeed, we think that both the stated primary objective of discussions--to maximize the government's ability to obtain the best value, based on the requirements and evaluation factors set forth in the solicitation, FAR § 5.306(d)(2)--and, more significantly, the definition of discussions--which includes bargaining, consisting of persuasion, alteration of assumptions and positions, and give and take, FAR § 15.306(d)--arguably presuppose that there may be multiple discussions regarding an issue. Nothing in the regulation suggests that further discussions on an issue are impermissible simply because they may occur on separate occasions, over a period of time. We conclude that there was nothing improper in the agency's raising the same concerns in two rounds of discussions with FDC.²

MISSION SUITABILITY

As explained above, section M.6 of the solicitation provided that the mission suitability scores would be adjusted based on the realism of offerors' proposed costs.

² We note that, even under the prior version of the FAR, a procuring agency properly could reopen discussions to discuss a previously raised item when the agency felt such action was necessary to resolve its concerns before making an award. See Telos Corp., B-279493.3, July 27, 1998, 98-2 CPD ¶ 30 at 9-11; Prospective Computer Analysts, Inc., B-275262.2, Feb. 24, 1997, 97-2 CPD ¶ 22 at 3-5. Here, it appears NASA's reason for reopening discussions on the same items--it believed it had not discussed, or adequately discussed, certain deficiencies, see COS, Jan. 28, 2000, at 3-5--would meet this standard.

The adjustment would be based on the percentage difference between the agency's most probable cost analysis and the offeror's proposed costs, in accordance with a table set forth in section M.6. NASA deducted 10 points from Dynacs's mission suitability score under the understanding the requirements subfactor based on its finding that Dynacs's proposed cost for the cost-reimbursement items was [DELETED] what the agency determined was the most probable cost for those items.

Dynacs claims this reduction was improper, arguing that, based on its reading of the RFP, any adjustment to its mission suitability score was to reflect an analysis of its total proposed cost, that is, the cost for both cost-reimbursement and fixed-price items; NASA therefore improperly adjusted Dynacs's score based only on the cost-reimbursement items. Dynacs concludes that, since its total price for all items was within [DELETED] percent of the agency's most probable cost determination, no points should have been deducted from its mission suitability score.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that but for the agency's actions, it would have had a substantial chance of receiving the contract award. Black & Veatch Special Projects Corp., B-279492.2, June 26, 1998, 98-1 CPD ¶ 173 at 8; see Statistica, Inc. v. Christopher, 102 F.3d 1577 (Fed. Cir. 1996).

Based on our review of the record, even if Dynacs were correct (NASA maintains that it properly reduced Dynacs's score), Dynacs would not receive the award. In this regard, while the SSA took note of the difference in Dynacs's and FDC's point scores (881 versus 740) he did not base his award decision on the scores. Rather, the SSA looked beyond the point scores to the merits of the offerors' proposals. The SSA considered that both offerors were rated very good under mission suitability, SSS at 10, and notwithstanding the 10-point reduction based on the cost realism adjustment, determined that Dynacs's proposal was superior to FDC's under the understanding the requirements subfactor. Since the SSA therefore was well aware of the superiority of Dynacs's proposal in this area when he made the award decision, there is no reason to believe that adding 10 points to Dynacs's score would have had any effect on that decision. In the final analysis, the SSA simply concluded that any technical advantages available from Dynacs's proposal were more than offset by FDC's [DELETED] cost/price advantage and [DELETED].³ SSS at 10.

³ In Dynacs's January 18, 2000 comments in response to the agency report, Dynacs for the first time argued that the cost/price/technical tradeoff was improper because NASA did not consider the risk associated with FDC's cost proposal. This argument is based on a document Dynacs received from NASA on December 22, 1999. Since Dynacs did not raise the argument within 10 days of that date, it is untimely. 4 C.F.R. § 21.2(a)(2) (1999). In any case, our review of the source selection decision demonstrates that the SSA was aware of the risks in FDC's cost/price proposal; the
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SUPPLEMENTAL PROTEST

On February 18, Dynacs submitted a supplemental protest in which it argues that NASA did not adequately document the process by which it obtained authorization from the Associate Administrator for Procurement to reopen discussions. As NASA points out, however, while the agency is required to obtain the Administrator's permission to reopen discussions, there is no requirement that it provide formal documentation or a specific justification for doing so. See NASA FAR Supplement § 1815.307(b)(ii). Thus, there is no legal basis for this protest ground. Dynacs also argued that NASA did not perform a cost realism analysis of FDC's FPR-2, and that there thus was no apparent basis for the increase in FDC's mission suitability score based on FPR-2. In response, NASA provided documentation showing that it did perform a cost realism analysis of FDC's FPR-2, NASA Statement, Feb. 22, 2000, at 1-2, 3, and Dynacs no longer argues that the second analysis was not performed. Instead, Dynacs now questions whether the documentation is genuine. However, there is no evidence, or reason to believe, that the documents are not authentic.

The protest is denied.

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SSA believed that, even with these risks, the potential savings from FDC's proposal were substantial. SSS at 10.